PHUA CORP. SDN. BHD.

v.

NEWACRES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-22-719-90]
23 JUNE 1992

CIVIL PROCEDURE: *Plaintiff appealed against refusal by SAR to grant leave to enter summary judgment against defendants - Rules of the High Court 1980 O. 14 - Whether sufficient to grant judgment on documentary evidence alone.*

CONTRACT: *Whether defendant failed to deliver vacant possession as agreed - Liquidated damages - Whether defendant entitled to rely on force majeure clause in agreement - Construction of terms of agreement.*

LAND LAW: *Absolute assignment of property to bank by the plaintiff - Whether plaintiff can sue on its own name under s. 4(3) of Civil Law Act 1956.*

CIVIL PROCEDURE: *Locus standi - Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd. - Whether plaintiff had locus standi to institute the action for summary judgment.*

This was an appeal by the plaintiff against the refusal by the Senior Assistant Registrar on 6 February 1991 to grant leave to enter summary judgment against the defendants.

The plaintiff had instituted the action for liquidated damages for RM112,566.57 on 1 March 1990 pursuant to O. 14 of the Rules of the High Court 1980 in respect of a breach of a sale and purchase agreement dated 22 September 1983. They had purchased a property for RM563,000 which under the agreement should be completed and vacant possession delivered within 36 months i.e. on or before 21 September 1986 and must include the supply of water and electricity.

The plaintiff alleged that the defendants and/or their agents applied to the LLN for electricity supply only on 27 January 1989 and the electricity meter was fixed on 18 March 1989, thereby breaching the terms of the agreement and liable to pay the liquidated damages as per terms of the agreement from 19 March 1989.

The appeal turned on the construction of the terms of the sale and purchase agreement which raised three issues, namely:

(i) The date when vacant possession must be delivered to the plaintiff pursuant to the terms of the sale and purchase agreement.

(ii) The meaning of vacant possession within the said terms.

(iii) Whether plaintiff had *locus standi* to institute the action in their own name.

Held:

[1] In the interpretation of the terms of a private contract, the Judges should not impose new terms or rewrite the contract and their function was only to express the intention of the parties to the contract *(Trollope v. Colls Ltd.).*

[2] There were ambiguities as to the extent of the obligation of the defendants to deliver vacant possession of the said property which cannot be resolved at the summary stage

particularly when the defendants have raised triable issues which can only be resolved at a trial proper. Therefore, the plaintiff was not entitled to O. 14 summary judgment.

[3] The issue of default on the part of the defendant to supply electricity to the said building also cannot be tried summarily on documentary evidence alone as it involved the question whether the defendants could rely on Clause 32 which excluded their liability if the delay was caused by the "relevant" authorities i.e. LLN.

[4] As the plaintiff had assigned absolutely all their rights, title and interest under the agreement to the United Asian Bank, they were not as assignees entitled to sue under their own name. Though the bank had executed a deed of receipt and reassignment dated 22 May 1990, i.e. two months after the plaintiff had instituted the action, under the authority of *Nouvau Mont Dor's* case their *locus standi* was questionable.

[Appeal dismissed with costs.]

Cases referred to:
River Wear Commissioners v. Adamson [1877] 2 AC 743 ***(refd)***
Trollope v. Colls Ltd. [1973] 2 All ER 262 ***(refd)***

Legislation referred to:
Civil Law Act 1956 s. 4(3)
Rules of the High Court 1980 O. 14

For the plaintiffs - J. Morais; M/s. Tay, Tee & Nasir
For the defendants - S.K. Tan; M/s. Allen & Gledhill

JUDGMENT

Lim Beng Choon J:

After filing their writ with a statement of claim on 1 March 1990 and service thereof on the defendants on 8 March 1990, the plaintiffs applied by way of summons in chambers for leave to enter summary judgment in respect of their claims against the defendants on 31 March 1990 (enclosure 5) pursuant to O. 14 of the Rules of the High Court 1980 after the defendants had entered appearance on 13 March 1990. The plaintiffs' application was supported by an affidavit affirmed by their solicitors affirmed on 29 March 1990 who merely stated, without more, that the deponent believed that there was no defence to the action. After the defendants had filed their statement of defence on 10 April 1990, one Fu Kia Pha ("Fu") the managing director of the plaintiffs' company affirmed a further affidavit on 18 May 1990 (encl. 7) to support the plaintiffs' application.

In his further affidavit Fu averred certain facts and the grounds relied upon by the plaintiffs to get summary judgment. I do not propose to reproduce all the averments as set out in the statement of claim of the plaintiffs and/or the further affidavit in encl. 7 as I shall be referring to some of the more relevant facts and grounds as mentioned in the averments later. However that may be it is necessary to mention very briefly what the action is all about and the nature of the claims of the plaintiffs. By a sales and purchase agreement dated 22 September 1983 ("the agreement") the defendants sold and the plaintiffs purchased the parcel of land known as Lot L1-650 Taman Sri Muda ("the said lot") together with a permanent commercial and light industrial building ("the said building") as described therein. The purchase price was RM565,000. According to the plaintiffs, the said building, pursuant to the agreement, should be completed and ready for delivery of possession within 36 months i.e. on or before 21 September 1986 inclusive of the supply of electricity. Should the defendants fail to give delivery on or before the stipulated date, the defendants would have to pay the plaintiffs

agreed liquidated damages calculated from day to day at the rate of 8% per annum on the purchase price from the stipulated date to the date of actual completion and delivery of vacant possession of the said building to the plaintiffs. The plaintiffs alleged that the defendants and/or their agents had applied to the Lembaga Letrik Negara ("LLN") for supply of electricity to the said building only on 27 January 1989 and the electricity meter was affixed on 18 March 1989. The defendants were therefore in breach of the agreement and were liable to pay the plaintiffs the sum of RM112,566.57 particulars of which were given as follows:

Date of delivery pursuant to agreement (due date)	21 September 1986
Date of actual delivery	18 March 1989
Period of delay:	909 days
Computation of Damages	909/365 x 8/100 x RM565,000
	= RM112,566.57

The plaintiffs therefore claimed for the aforesaid sum with interest at the rate of 8% per annum from 19 March 1989 to the date of full realisation and costs.

The defendants filed in their statement of defence on 10 April 1990 and one Manjit Singh a/l Pritam Singh ("Manjit Singh"), the assistant litigation manager of the defendants' company affirmed an affidavit in reply on 6 October 1990 in support of the defence (encl. 8). Again I do not propose to reproduce the averments set out in the statement of defence and/or the affidavit in reply in encl. 8 for the same reason as given by me in not reproducing the averments of the statement of claim and affidavit in support of the plaintiffs' application.

The application of the plaintiffs for leave to enter summary judgment was heard by the Senior Assistant Registrar who gave her decision on 6 February 1991 whereby she dismissed the plaintiffs' application. Thereafter the plaintiffs filed a notice of appeal on 19 February 1991 against the said decision.

The appeal involves three main issues namely:

1. When must vacant possession be delivered to the purchaser within the terms of the agreement?
2. What is meant by vacant possession within the said terms?
3. Whether the plaintiffs have any standing to institute this action in their own name.

It is clear to me that issue 1 and issue 2 are inter-related and it would be convenient to consider these two issues together. In considering these two issues I shall first of all refer to Clause 19 of the agreement. At the outset I should mention that for the sake of brevity any reference made in this judgment to a clause must necessarily mean the clause as set out in the agreement. Clause 19 is entitled "Delivery of Vacant Possession" and it provides *inter alia:*

> Upon the issue of the Vendor's architect of a certificate certifying that the construction of the said Building has been duly completed ... the Vendor shall deliver to the Purchaser vacant possession of the said Building and the said Lot PROVIDED THAT such possession shall not give the Purchaser the right to make any alterations or additions to the said Property or **to occupy the said building and the said Lot until such time as the Certificate of Fitness for Occupation is issued by the** Appropriate Authority upon expiry (etc. up to) fittings therein.
>
> (Emphasis supplied)

Next I shall refer to Clause 18 entitled "Time For Completion" and para. 1 of that clause provides *inter alia:*

> 18:1 **Subject to Clause 32** herein ... the said Building **shall be completed** and the Vendor **shall deliver vacant possession** of the said property to the purchaser **not later** than the period specified in s. 7 of the First Schedule hereto. For the purposes of this clause, it is hereby agreed that completion of the said Building shall **not** include the supply of water/or electricity to the said Building if such supply is not available for any reason other than **the default** of the Vendor.
>
> (Emphasis supplied)

Section 7 of the First schedule reads:

7. Time for completion	Thirty six (36) calendar-months from the date of this agreement.

As Clause 18.1 is conditional upon ("subject to") the provisions of Clause 32, it is necessary to examine the latter clause which *inter alia* says:

> 32. *FORCE MAJEURE* ETC.
>
> The Vendor shall **not be liable in any way** if, in the Vendor's architect's opinion any delay in completion of the Said Building ... is due to or caused by ... the disability of contractors and subcontractors **employed by the Vendor** in either commencing, carrying their work or the Vendor's inability for reasons beyond his control to obtain any necessary sanction or approval of appropriate authorities **or other like causes** beyond the Vendor's control ...
>
> (Emphasis supplied)

In his submission on issues 1 and 2 Counsel for the plaintiffs argued *inter alia* that reading Clause 18 together with s. 7 of the First Schedule of the agreement it was clear that the said building must be completed and vacant possession delivered within 36 months from the date of the agreement which must necessarily mean on or before 21 March 1986. According to him the completion of the said building **must include** the supply of water and/or electricity to the said building. In the present case, so said Counsel, the supply of electricity was not connected until 18 March 1989 and the delay was caused by the default and/or neglect on the part of the defendants and/or their agents in that they had failed and/or neglected to apply to LLN for the supply of electricity before the stipulated date for completion and/or to ensure that any application made before the stipulated date should comply with the requirements of LLN. That being the case, Counsel went on to argue that the plaintiffs were entitled to be paid the agreed liquidated damages in the sum of RM112,566.57 together with interest at the agreed rate and the plaintiffs' appeal should be allowed with costs.

Counsel for the defendants, on the other hand, submitted *inter alia* that while clause 18 talks of "Time For Completion", Clause 19 specifically deals with the "Delivery of Vacant Possession". Counsel therefore suggested (if I have not misunderstood him) that the defendants were only bound to hand over vacant possession of the said lot with the said building (collectively referred to as "the said property") in accordance with Clause 19. Counsel therefore proceeded to argue that as long as the defendants had fully complied with the provisions of Clause 19 and duly delivered vacant possession of the said property under that clause, they could not be held liable for any default on their part or on the part of their agents. In the present case the defendants had adduced sufficient evidence to show that they had fully complied with Clause 19. However that may be Counsel then went on to argue

that should this Court be inclined to accept the plaintiffs' contention, the defendants would submit that it was obvious that the question of vacant possession was a question of fact. Moreover, the question of alleged default on the part of the defendants to supply water/ electricity to the said building was again a question of fact. That being the case, Counsel submitted that this action could not be fairly disposed of at this summary stage - it should go for full trial to enable the plaintiffs and the defendants to give evidence as to the intention of the parties pertaining to the agreement. Furthermore the plaintiffs and the defendants should also be allowed to call witnesses to testify as to the alleged default of the defendants. The defendants therefore prayed that the plaintiffs' appeal should be dismissed with costs.

From the arguments of Counsel, it is clear to me that this Court is called upon to give a proper construction of the several clauses of the agreement of which I have earlier reproduced with special emphasis on Clauses 18 and 19. In this connection a useful analogy may be borrowed from the Latin maxim *judicis est jus dicere non dare* - it is the function of the Judge to declare the law and not to make it.

Thus in *River Wear Commissioners v. Adamson* [1877] 2 AC 743 at 764, Lord Blackburn warned:

> It is to be borne in mind that the office of the Judge is **not to legislate but to declare** to the expressed intention of the Legislature even if that intention appears to the Court injudicious.
>
> (Emphasis supplied)

Likewise in the interpretation of the terms of a private contract the Judge is not to impose new terms in or rewrite a contract and his function is only to express the intention of the parties to the contract - see *Trollope v. Colls Ltd.* [1973] 2 All ER 262.

Bearing in mind the aforesaid principles of law I shall now examine the provisions of Clauses 18 and 19 of the agreement. Upon reading of Clause 18.1 it would appear that it was the intention of the parties to ensure that the said building must be completed and delivery of the vacant possession of the same should be made within the stipulated period i.e. on or before 21 September 1986. However the proviso of Clause 19 appears to qualify the extent of the obligation of the defendant to deliver vacant possession in this manner:

(1) the delivery of vacant possession of the property shall be made not only excluding the rights of the purchaser to make any alterations or additions to the property but more importantly also the intrinsic right of occupation of the said property by the purchaser until such time as the Certificate of Fitness for Occupation ("CFO") is issued by the appropriate authority;

(2) the delivery of vacant possession can be made by a notice in writing sent by the Vendor requesting the purchaser to take vacant possession; and

(3) upon the expiry of 14 days from the date of expiry of the said notice in writing the purchaser **shall be deemed** to have taken vacant possession regardless of whether or not the purchaser has in fact agreed to accept vacant possession.

Reading the two clauses together it appears to me that there is clearly an ambiguity as to the extent of the obligation of the defendants to deliver vacant possession of the said property. This ambiguity can by no means be resolved at this summary stage particularly when the defendants have adduced affidavit evidence to show that:

(a) they had by their letter of 6 June 1986 (annexed as Exhibit "MS-1" to encl. 8) given the required 14-day notice to the plaintiffs to take vacant possession of the property in accordance with Clause 19;

(b) by the same letter the defendants had also enclosed a certificate of practical completion ("CPC") issued by the relevant architects of the project;

(c) by the same letter the plaintiffs were required to take steps to make certain payments to the solicitors for the defendants to hold as stakeholder whereupon they could collect the keys and carry out inspection of the property;

(d) the electrical wiring to the ground, first, second and third floor of the property was completed on diverse dates spreading over a period of 11 September 1984 to 28 January 1985 and progressive payments for the electrical works had been duly paid by the plaintiffs (see Exhibit "MS2" annexed to encl. 8);

(e) the application for CFO had been made by the defendants and duly approved by the Majlis Perbandaran Shah Alam on 21 January 1985 although the actual date of the issue of the CFO was 24 January 1989 (see exhibit "S-3" annexed to encl. 8).

Based on the affidavit evidence adduced by the defendants at this summary stage could it be said with any degree of certainty that the defendants had failed to comply with Clause 18? I do not think so. Even assuming that one could, on the balance of probabilities, say that the defendants were in breach of Clause 18, then one still has to consider the provisions of Clause 19 which as I have said earlier have cast doubt as to the extent of the obligation of the defendants to deliver vacant possession. Under the circumstances it is clear to my mind that the defendants have succeeded in raising triable issues which can only be resolved at the trial proper. That being the case the plaintiffs are not entitled under the law to an O. 14 summary judgment.

In any case another matter to consider is whether the question of the alleged default on the part of the defendant to supply electricity to the said building can be resolved at this summary stage. In this connection I agree with Counsel for the defendant when he submitted that the matter involved "a question of fact" which the defendant submits cannot be tried summarily on documentary evidence alone. I say so for these reasons. In the first place the plaintiffs pleaded in their statement of claim that the supply of electricity was not available on 18 March 1989 and the delay was caused by the default of the defendants in that they and/or their agents failed or neglected to apply to LLN for supply of electricity before the stipulated date and/or to ensure that any application made before the said date complied with the requirements of LLN. In their statement of defence the defendants however denied any default on their part and further pleaded that "... Clause 32 of the agreement expressly and/or impliedly exclude(s) the defendants' liability if any delay is caused by the **relevant** authorities." Based on these pleadings it is clear to me that the question of whether the defendants could rely on Clause 32 to avoid liability is primarily a question of fact which can only be resolved when the case goes on full trial.

Secondly in the plaintiffs' further affidavit in support affirmed by Fu (encl. 7) the plaintiffs merely repeated what they had alleged in their statement of claim and merely added an allegation that the "delay was not caused by the relevant authorities as established by Exhibit FKP3 and accordingly Clause 32 of the agreement does not apply". Exhibit "FKP3" was a letter dated 7 February 1990 written by LLN to the solicitors of the plaintiffs in which they said *inter alia* that the electrical contractor (kontraktor pendawaian) had applied for electricity supply on 22 June 1984 but the application was rejected because the said contractor failed to carry out and complete the work within 6 months. The said contractor had re-applied to LLN for electricity on 27 January 1989. This failure on the part of the electrical contractor was one of the factors relied on by the plaintiffs to support their allegation of default on the part of the defendants. The defendants, however have, as stated earlier adduced sufficient

affidavit evidence at least at this summary stage to show that it could not be said with any degree of certainty that they had failed to comply with Clause 18. On the contrary based on the evidence adduced in the present case it would certainly appear that the defendants have at the very least complied with Clause 19 if not Clause 18. At any rate it must be noted that Clause 18.1 says that should the failure to obtain water and electricity supply be due to the default on the part of the defendants, the plaintiffs would be entitled to claim compensation from them pursuant to Clause 18(2). This provision begs the question as to whether from the evidence adduced at this summary stage, the defendants were at fault in failing to obtain the electricity supply. Even assuming for the sake of argument that the plaintiffs have succeeded in discharging the onus of proving (which onus is clearly on the plaintiffs) that the defendants had defaulted the next subsidiary question to ask is whether the defendants could claim protection under Clause 32. Bearing in mind that in their statement of defence the defendants have pleaded:

> The said Clause 32 of the agreement expressly and/or impliedly exclude the defendants' liability if any delay is caused by the relevant authorities as aforesaid ...,

it certainly cannot be said that from the evidence adduced at this summary stage, there is a clear-cut answer to the question of default. If at the end of the day the defendants were able to establish that the delay was not caused by them but by "the relevant authorities" whose name is yet unknown then it may well be that the defendants would be fully protected by Clause 32. In saying this I have not overlooked the evidence adduced by the plaintiffs showing that the application for electricity supply made on 22 June 1984 was made by Brite Life Electrical Engineering Sdn. Bhd. who presumably was the electricity subcontractor. This evidence by itself does not mean that the delay must be caused by this subcontractor. It may well be that by reason of the intervention of "the relevant authorities" the electrical work was held up. In any event any default on the part of the defendants' subcontractor does not deprive the defendants from relying on the protection under Clause 32. I would even go a step further and say that by their pleadings the defendants seemed to suggest that even LLN might well be at fault. I say this because we do not know at this stage whether LLN had the right to reject the application made in 1984. It may well be argued that if LLN was at fault the defendants should have taken out third party proceeding against them. But then the plaintiffs had jumped the queue and applied for summary judgment even before the defendants could file their defence.

For the above reasons I am satisfied that the aforesaid appeal of the plaintiffs must be rejected.

Issue 3

In considering this issue I had taken note that the plaintiffs did not dispute that they had assigned absolutely all their rights, title and interest under the agreement to the United Asian Bank. In short the assignment is an absolute one. That being the case it would appear that under s. 4(3) of the Civil Law Act 1956 the plaintiffs as assignor, were not entitled to sue in their own name. It is true that United Asian Bank had on 22 May 1990 executed a deed of receipt and reassignment dated 22 May 1990, two months after the plaintiffs had instituted this action. On the authority on the *Nouvau Mont Dor's* case, it would again appear that the issue of the *locus standi* of the plaintiffs is questionable.

For the above reasons the appeal of the plaintiffs is dismissed with costs.

Also found at [1992] 4 CLJ 2179